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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-38

MARGARET ELLEN CRAWFORD, a minor, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to
The California Court of Appeal
Second Appellate District

BRIEF OF *AMICUS CURIAE* PALO ALTO UNIFIED SCHOOL DISTRICT IN SUPPORT OF RESPONDENT BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

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I.

INTEREST OF *AMICUS CURIAE*

Palo Alto Unified School District ("Palo Alto"), appearing as *amicus curiae* with the consent of the parties, is one of the defendants in *Tinsley* v. *Palo Alto Unified School District,* 1 Civil 50997, currently pending in the California Court of Appeal for the First Appellate District. The central issue in

Tinsley, as here, is whether Proposition 1 violates the equal protection clause of the 14th Amendment. Oral argument and further proceedings in *Tinsley* have been stayed pending this Court's decision here.

While the legal issue presented in *Tinsley* is identical to the primary legal issue here, the factual context is wholly different. In *Tinsley*, the defendants are nine different elementary school districts, selected by plaintiffs, that are spread over the two counties that make up the Peninsula area. Plaintiffs assert that those school districts have violated the equal protection clause of the California constitution because they have different racial mixes of students when compared with each other. Importantly, there is no claim of *de jure* segregation. Indeed, the petition in *Tinsley* expressly disclaims that any act of any school district or other defendant contributed to or in any way caused the alleged racial imbalance. Thus, *Tinsley* presents the question of whether Proposition 1 violates the 14th Amendment in the context of an *inter*-district, *inter*-county, admittedly *de facto* case.

The California Court of Appeal and the parties in *Tinsley* agree that this Court's decision in this case and in *Seattle School District No. 1* v. *State of Washington*, 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd in part and rev'd in part*, 633, F.2d 1338 (9th Cir. 1980), *prob. jur. noted*, 50 U.S.L.W. 3278 (No. 81-9, Oct. 13, 1981) will be highly relevant, if not dispositive, authority in deciding *Tinsley*. As such, Palo Alto has a significant interest in the outcome of this case.

II.
SUMMARY OF ARGUMENT

Proposition 1 was passed by the people of California to repeal a judicially-created extension of state constitutional law beyond the parameters of the 14th Amendment. The effect of Proposition 1 was to conform state law to the 14th Amendment. Both logic and precedent compel the conclusion that such action cannot itself violate the 14th Amendment.

In 1976, the California Supreme Court in *Crawford* v. *Board of Education*, 17 Cal.3d 280, 551 P.2d 28, 130 Cal. Rptr. 725 (1976), held, in the context of an *intra*-district desegregation case, that the California constitution required courts to remedy statistical racial imbalance in schools regardless of the absence of any prior intentional discrimination on the part of the school district. In *Tinsley* v. *Palo Alto Unified School District*, 91 Cal.App.3d 871, 154 Cal. Rptr. 591 (1st Dist. 1979), the California Court of Appeal extended *Crawford* to require adjoining school districts to remedy *inter*-district statistical racial imbalance. In November 1979, the people of California repealed those decisions by passing Proposition 1, conforming the state constitution to the 14th Amendment.

Petitioners here and in *Tinsley* argue that the repeal of the *Crawford-Tinsley* cases itself violates the equal protection clause of the 14th Amendment. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 407, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977) and its progeny establish that the mere repeal of a state obligation cannot violate the 14th Amendment unless the repealed obligation was originally compelled by the 14th Amendment.

III.

ARGUMENT

1. Proposition 1 Merely Repeals The *Crawford-Tinsley* Line of Cases.

Proposition 1 repeals the judicially-created California constitutional obligation of school districts to eliminate statistical racial imbalance, an obligation imposed even in the absence of a finding of intentional discrimination. It does so by using language that conforms the *obligations* of school districts under the California equal protection clause to the *obligations* with respect to pupil assignment and pupil transportation imposed by the 14th Amendment. That Proposition 1 was intended to repeal the independent state constitutional duty is shown most clearly by the legal background of its enactment.

Early federal school desegregation cases established the unconstitutionality of officially-sanctioned dual schools. *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.873 (1954). In the 1960s, the federal courts expanded that prohibition of dual school systems into a federal duty to integrate in a large number of circumstances. *E.g., Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964). That expansion was limited in 1971 in *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), where this Court held that the 14th Amendment required no particular degree of racial mix and that, absent a federal constitutional violation, a federal court has no authority to assign students to schools on the basis of race.

Two years later, in *Keyes* v. *School District No. 1,* 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), the Court held that to establish a violation of the 14th Amendment, plaintiffs must prove that the school district intentionally or purposefully brought about or maintained a segregated school system. Thus, the court in *Keyes* solidified the distinction between *de jure* (intentional or purposeful) segregation and *de facto* (statistical racial imbalance) segregation. *Keyes* v. *School District No.1, supra,* 413 U.S. at 209. *See, e.g., Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 91 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Columbus Board of Education* v. *Penick,* 443 U.S. 499, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979). Finally, in *Milliken* v. *Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), an inter-district case, this Court held that federal courts cannot impose desegregation remedies exceeding the scope of the federal constitutional violation involved.

Coincident with federal developments, California courts were interpreting the language of the California constitution. The California courts began to diverge from federal law in *Jackson* v. *Pasadena City School District,* 59 Cal.2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963), where the court recognized a state duty to alleviate racial imbalance regardless of cause. Subsequently, in *Crawford* v. *Board of Education, supra,* decided after *Keyes,* the court held that school boards had a state

constitutional duty to take reasonably feasible steps to remedy racial imbalance between schools in the same school district, regardless of the cause of the imbalance. This ruling, based upon the equal protection clause of the California constitution, was an express departure from federal equal protection law. Subsequently, the California Court of Appeal in *Tinsley* extended *Crawford* by holding that the California constitution obligated school districts to remedy *inter*-district racial imbalance, even in the absence of a showing of any intentional segregation.

The *Tinsley* extension of California law separated California law from federal law in two ways. First, applying *Crawford, Tinsley* held that no intentional conduct on the part of school districts is necessary to trigger judicial imposition. Second, unlike *Crawford, Tinsley* authorized courts to create school attendance plans that cross both district and county lines, even though no racial imbalance exists within a given school district.

Proposition 1 was enacted by the people in 1979 to repeal the judicial holdings in *Crawford* and *Tinsley*. That repeal was the narrow purpose of Proposition 1.

The fact that Proposition 1 is a repeal and no more is confirmed by what it does *not* do. Proposition 1 has no impact on situations where *de jure* segregation does, or might, exist. It does not purport to impede or prevent a state or federal court from finding *de jure* segregation and ordering a school district to remedy that violation.

Proposition 1 does not prevent school districts or other state educational officials from undertaking voluntarily programs or policies to promote racial balance. It expressly preserves that right for school districts. Nor does Proposition 1 prevent the state legislature or any city or county government from enacting legislation requiring school districts to eliminate racial imbalance. It speaks only in terms of eliminating a court-created constitutional duty.

Proposition 1 does not affect the political processes of the state. Proposition 1 makes no change in the power of school districts, administrators, the legislature, cities or counties to decide and implement any educational or integration issue.

Petitioners argue that Proposition 1 limits the ability of courts to use two specific remedies, pupil reassignment and pupil transportation, to correct a violation of the state constitutional duty and thus establishes a discriminatory court system that allows courts to remedy fully some wrongs but not others. The argument, raised for the first time in this Court, is without merit. Even if Proposition 1 only eliminates certain remedies, it is still only a repeal of a prior extension of state law not compelled by the federal constitution. The repeal of some but not all of the remedies available to California courts merely means that California law is more extensive than federal law concerning some remedies but not others. Petitioners cannot escape the fact that Proposition 1, by its terms, limits its repeal to the scope of the 14th Amendment.[1]

Plaintiffs in *Tinsley, amici* here, argue that two of the minor provisions of Proposition 1, the modification of prior judgments provision and the calendar preference provision, are positive discriminatory acts and transform Proposition 1 from a repeal to a state act which violates the 14th Amendment. The argument misses the point. The people, by enacting Proposition 1, repealed the *Crawford-Tinsley* extension of the state equal protection clause. These provisions simply implement that repeal.

In sum, the language of Proposition 1 and the legal background of its enactment show that it is nothing more than a repeal of a prior, judicially-created state constitutional duty. It repeals that duty only to the extent that it goes beyond the requirements of the 14th Amendment. As shown below,

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[1] Petitioners also misconstrue the effect of Proposition 1. As shown earlier, Proposition 1 eliminates the underlying state constitutional duty, not merely some of the remedies. It specificially speaks of eliminating the "obligations or responsibilities which exceed those imposed by the equal protection clause of the 14th Amendment. . . ."

Petitioners' argument that the decision of the California Court of Appeal below authoritatively construes the effect of Proposition 1 misstates California law. The decision of the Second Appellate District is not in any way binding or controlling authority on other California appellate courts who may be called upon to interpret Proposition 1. 6 Witkin, Calif. Proc. § 667 at 4580 (2d ed. 1971)(and the multitude of cases cited therein). Thus, the First Appellate District, before which *Tinsley* is pending, may well conclude that Proposition 1 does, in fact, repeal the underlying duty.

conforming state obligations to the requirements of the 14th Amendment cannot, indeed logically could not, violate the 14th Amendment.

2. The Repeal Of A State Law Not Compelled By The 14th Amendment Cannot Itself Violate The 14th Amendment.

A. *Dayton* And Other Cases Establish That A Mere Repeal Cannot Violate The 14th Amendment.

The constitutional difference between a repeal and broader state actions, established in *Dayton,* authorizes the repeal of a prior state act if that prior act itself was not compelled by a federal constitutional duty. This Court foreshadowed that analysis by reserving the repeal question as early as 1967. In *Reitman* v. *Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), the Court pointed out that the effect of the California proposition in that case was much broader than a mere repeal. It stated: "The California court could very reasonably conclude that Section 26 could, and did have, wider impact than a mere repeal of existing statutes . . . The section struck more deeply and more widely." *Reitman* v. *Mulkey, supra,* 387 U.S. at 376-77.

Two years later, in *Hunter* v. *Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), this Court expressly reserved the repeal question:

> By adding § 137 to its Charter the City of Akron, which unquestionably wields state power, not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect.[5]
>
> [5] Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.

Hunter v. *Erickson, supra,* 393 U.S. at 389-90.

When this Court reached the question of whether the repeal of a state obligation not compelled by the federal constitution could violate the 14th Amendment, it concluded that it could not. In *Dayton,* the Court considered the

constitutionality of a school board's repeal of an earlier resolution committing the board to the goal of racial balance. This Court approvingly quoted the following language from the opinion of the Sixth Circuit:

> The question of whether a rescission of previous board action is in and of itself a violation of appellant's [federal] constitutional rights is inextricably bound up with the question of whether the board is under a [federal] constitutional duty to take the action which it initially took. [Citations omitted.] *If the board was not under such a duty then the rescission of the initial action in and of itself cannot be a [federal] constitutional violation.* If the board was under such a duty, then the rescission becomes a part of the cumulative violation. . . .

Dayton, supra, 433 U.S. at 415, quoting *Brinkman* v. *Gilligan,* 503 F.2d 684, 697 (6th Cir. 1974) (emphasis added).[2] The principle that the constitutionality of a rescission turns on whether the original act was constitutionally compelled was reaffirmed in *Dayton Board of Education* v. *Brickman,* 443 U.S. 526 99 S.Ct. 2971, 61 L.Fed. 2d 720 (1979), where the Court said:

> . . . [R]escission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment.

Dayton, supra, 443 U.S. at 531 fn. 5.

Thus, whether a repeal of state law is a violation of the federal constitution is a question of whether the repealed state action was federally compelled in the first instance. Here, as petitioners concede, the duty imposed by the *Crawford-Tinsley* line of cases was clearly not federally compelled, and thus the repeal of that duty cannot violate the 14th Amendment.

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[2] The *Tinsley* plaintiffs attempt to distinguish *Dayton* from this case by pointing to language in *Dayton* which shows that the school board had not yet implemented the plan at the time of repeal. This attempt is misplaced for two reasons. First, they offer no theory that gives any constitutional significance to this distinction. Second, subsequent cases read the implementation language in *Dayton* as dictum and approve a repeal even though the prior law has been implemented. *See Associated General Contractors of California* v. *San Francisco Unified School District,* 616 F.2d 1381 (9th Cir. 1980); *Crawford* v. *Board of Education,* 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (2d Dist. 1980).

Indeed, Proposition 1 expressly embraces the duties and obligations imposed by the 14th Amendment.

The *Dayton* principle has been reaffirmed in many contexts. In *United States* v. *School District of Ferndale, Michigan,* 460 F. Supp. 352 (E.D. Mich. 1978), for example, the court dealt with a school district's failure to eliminate traditional classrooms after a finding by the Department of Health, Education and Welfare ("HEW") that those classrooms contributed to *de jure* segregation. The court, in overturning the finding of *de jure* segregation by the HEW hearing examiner, noted:

> Plaintiff appears to urge that School District's failure to eliminate the traditional classrooms after the HEW hearing and the decision of HEW that School District had been guilty of *de jure* segregation is itself a constitutional violation. This would be so only if School District were under a constitutional duty to desegregate [citing *Dayton*].

United States v. *School District of Ferndale Michigan, supra,* 460 F. Supp. at 377.

Brown v. *Califano,* 627 F.2d 1221 (D.C. Cir. 1980), adopts the same position. Faced with an attack on the 1974 Equal Educational Opportunities Act, which repealed prior HEW guidelines broader than the 14th Amendment, the court held that the act of repealing the guidelines did not violate the 14th Amendment because it did not impair any constitutional duty.

The Ninth Circuit recently acknowledged this rule in *Associated General Contractors of California* v. *San Francisco Unified School District,* 616 F.2d 1381 (9th Cir. 1980). At issue there was the constitutionality of a recently-enacted state law that repealed a school board affirmative action policy that was broader than the 14th Amendment. The court held that the state law was not unconstitutional, even though it repealed the board's affirmative action policy, because the board had no prior federal constitutional duty to enact the policy. The Ninth Circuit stated:

> Appellants argue further that once a program is proven in practice to dispel discrimination, it is unconstitutional to withdraw from it. By this logic, even if the Board was not initially compelled by the Constitution to adopt its affirmative action policy, it is now compelled to continue it.
>
> Apparently, the Supreme Court's position is that it is a constitutional violation for a school board to rescind previous action if and only if the board is under a constitutional duty to take that action initially. *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 414, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977). Because we hold that the Board had no constitutional duty to adopt its affirmative action policy, the Constitution does not forbid the Board to return to its former race-neutral policy.

Associated General Contractors of California v. *San Francisco Unified School District, supra,* 616 F.2d at 1389.

Finally, Mr. Justice Rehnquist noted this principle in the context of Proposition 1 itself. Sitting as Circuit Justice in *Board of Education of Los Angeles* v. *Superior Court,* 448 U.S. 1343, 101 S.Ct. 21, 65 L.Ed.2d 1166 (1980), and quoting from the trial court in *Tinsley,* he stated:

> I find myself unable to articulate the point better than Judge Cohn of the Superior Court of San Mateo County in *Tinsley* v. *Palo Alto Unified School District, No. 206010* (July 10, 1980):
>
> > 'Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution.'

Board of Education of Los Angeles v. *Superior Court, supra,* 101 S.Ct. at 22-23.

This line of federal authority establishes that a mere repeal of a state act not previously compelled by the 14th Amendment cannot violate the 14th Amendment. The application of that principle here, we submit, is simple. Proposition 1 repeals the *Crawford-Tinsley* line of cases and as such it does not violate the 14th Amendment.

B. No Case Holds That The Mere Repeal Of A State Law Can Violate The 14th Amendment.

No case relied upon by petitioners holds that a governmental action which merely conforms state law to the 14th Amendment is, in fact, a violation of the 14th Amendment. Each case cited that is even arguably relevant here involves some state action that promotes *de jure* segregation, skews the political processes of the community, or prevents school districts from dealing voluntarily with statistical racial imbalance.

For example, in *Hunter*, the Court (while expressly reserving the repeal question) struck down a city charter amendment that rescinded a fair housing ordinance *and* required future race-related housing ordinances, unlike all other ordinances, to be approved by a majority of the population. The ordinance violated the 14th Amendment because it fundamentally altered the city's political processes by placing a special burden on future attempts of minorities to pass city legislation. *Hunter* v. *Erickson, supra,* 393 U.S. at 389-90.

Hunter is inapplicable here. The political processes of California are not changed by Proposition 1. The people of California, in amending their constitution in the only way open to them, did not affect any existing political structure. The power of school boards and state officials to eliminate racial imbalance remains unchanged. The power of courts to resolve controversies likewise is not changed. Here, unlike *Hunter,* no additional burden forbidden by the 14th Amendment results from Proposition 1.

Petitioners also rely on *Seattle School District* v. *State of Washington,* 473 F.Supp. 996 (W.D. Wash. 1979), *aff'd in part and rev'd in part,* 633 F.2d 1338 (9th Cir. 1980), *prob. jur. noted,* 50 U.S.L.W. 3278 (No. 81-9, Oct. 13, 1981). The *Seattle* case involved a state initiative (Initiative 350) that

specified the instances in which pupil transportation and pupil assignment were permissible and did not provide for pupil assignment and pupil transportation for purposes of racial integration. The district court held the initiative unconstitutional. The Ninth Circuit affirmed, concluding that Initiative 350 was more than the mere repeal of a prior state attempt to remedy racial imbalance and thus was unconstitutional.

Seattle is different from this case in three important respects. First, the Ninth Circuit noted that the repeal of the local school board plan by a statewide initiative altered the fundamental political balance that existed in the state before Initiative 350. In distinguishing *Dayton*, the court noted:

> The state's argument that [*Dayton*] permits official rescission of previously adopted desegregation measures as long as there was no antecedent constitutional duty to remedy *de jure* segregation ignores the crucial fact that a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control. Initiative 350, unlike the situation in *Dayton*, results in the political process being skewed at the expense of the local representative bodies and their constituencies.

Seattle School District v. *State of Washington, supra*, 633 F.2d at 1346. Unlike *Seattle*, Proposition 1 does not skew the political processes of California by which integration policies are formed.

Second, Initiative 350 in the *Seattle* case wholly prohibited the use of pupil assignment and pupil transportation to remedy racial imbalance. Here, on the other hand, the power of school boards to utilize pupil transportation and pupil assignment to remedy racial imbalance is expressly preserved by the proposition itself.

Third, and most importantly, the district court in *Seattle* had held that the passage of Initiative 350 prevented local school boards from remedying what might possibly be *de jure* segregation. Initiative 350 was enacted after the Seattle school district had announced an integration plan in the face of

proceedings by the federal government alleging a *de jure* violation of the 14th Amendment. The district court held that although no judicial finding of *de jure* segregation had been made, Initiative 350's revocation of the Seattle plan interfered with the remedying of what might be a *de jure* violation. Here, Proposition 1 does not interfere with any federal duty. Whatever federal law commands, Proposition 1 permits.

Similarly, *Lee* v. *Nyquist,* 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd,* 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971) relied on by both the district court and the Ninth Circuit in *Seattle,* is also governed by principles that do not apply here. *Lee,* a pre-*Dayton* district court case, involved a state law that prohibited student assignment and student transportation for purposes of racial balance unless approved by a local board of education, a majority of whose members had been elected by the public. Prior to the enactment of the state law at issue in *Lee,* the State Commission of Education could order such remedies.

Lee has the same constitutional defects as *Seattle.* The passage of the state statute involved in *Lee* fundamentally altered the previously existing political structure of the state by revoking the power of the State Commissioner of Education to force local school districts to remedy racial imbalance. Like *Seattle,* local school boards were no longer permitted voluntarily to remedy racial imbalance. Finally, the state statute in *Lee* prevented some local school boards from remedying *de jure* segregation. None of these constitutional defects exists in Proposition 1.

In sum, no case holds that state action similar to Proposition 1 violates the 14th Amendment. To the contrary, all of the cases even arguably contrary involve state acts governed by sound, but nonetheless inapplicable, constitutional concepts. No case cited by appellants alters the basic point that the constitutionality of mere repeals is governed by *Dayton* and its

progeny and that, under those cases, Proposition 1 is constitutional.[3]

C. Strict Scrutiny Analysis Is Inappropriate.

Strict scrutiny is an inappropriate method of analyzing the governmental activity involved here. No case involving a mere repeal has adopted strict scrutiny analysis. As the *Dayton* cases and *Associated Contractors* make clear, whether a mere repeal violates the 14th Amendment turns solely on whether the repealed law was originally compelled by the 14th Amendment.

Appellants' authorities are not to the contrary. Indeed, the circuit opinion in *Seattle* confirms that strict scrutiny analysis is inappropriate where a mere repeal is involved. There the court noted that if the school board had repealed its own plan, the appropriate test for determining the constitutionality of that repeal would be whether the school district was under a pre-existing constitutional duty to eliminate segregation. The court said:

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[3] The *Tinsley* plaintiffs cite an extensive list of other cases for the proposition that repeals can violate the 14th Amendment, *e.g.*, *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed. 2d 256 (1964); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed. 2d 110 (1960); *Hadnolt* v. *Amos*, 394 U.S. 348, 89 S.Ct. 1101, 22 L.Ed. 2d 336 (1969); *United States* v. *Board of School Commissioners of Indianapolis*, 513 F.2d 400 (7th Cir. 1978), *cert. den.*, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed. 2d 116 (1979); and *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515, 82 S.Ct. 429 (1962), among others. All of these cases involved state acts that created a *de jure* violation of the 14th Amendment. None involves a repeal of state law back to the parameters of the 14th Amendment.

They also cite a number of alien cases, *e.g.*, *Oyama* v. *California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed. 2d 495 (1976); *Matthews* v. *Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed. 2d 478 (1976); and voting cases, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964); *Lucas* v. *44th General Assembly of Colorado*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed. 2d 632 (1964), for the proposition that the constitutional standards for federal and state acts are different. Neither line of cases is applicable. In both, there are special considerations for treating federal and state acts differently. No case in the school discrimination area has ever implied that the acts of states should be treated differently than the acts of the federal government.

> Had a successor school board to the one that adopted the Seattle Plan—instead of the state electorate as a whole—attempted to repeal or rescind the self-imposed student assignment plan, we would be faced with a quite different issue.

Seattle School District v. *State of Washington, supra,* 633 F.2d at 1345 n. 8.

The *Seattle* court, after discussing the holding in *Dayton,* concluded that if only a repeal were involved:

> . . . the constitutionality of Initiative 350 would hinge upon the Stage 2 determination of whether the Seattle school district has maintained a dual system or practiced *de jure* segregation.

Seattle School District v. *State of Washington, supra,* 633 F.2d at 1346 n. 8.

Further, repeals such as Proposition 1 do not classify. They merely conform the state constitution to the federal constitution and no two groups of people are being treated differently by the repeal.

More importantly, even if some classificatory scheme can be found in Proposition 1, it does not classify in an invidious way. To the extent that Proposition 1 creates a classification, it is a classification sanctioned by the 14th Amendment. That classification, by definition, cannot be impermissible.

D. The Rule Proferred By Petitioners Will Lead To Undesirable Results.

If, as petitioners argue, the mere repeal of a prior extension of state law beyond the parameters of federal law could violate federal law, undesirable results would follow. First, the prospect of being forever locked into an extension of state law beyond federal law would deter states from enacting legislation to remedy social problems as they perceive them. This deterrence would hamper the growth of state jurisprudence and unnecessarily restrict the flexibility of all levels of government in coping with social problems in the way they deem most appropriate.

Second, adopting petitioners' position would mean, in effect, that the 14th Amendment means something different in each state. If the 14th Amendment is the bar to the repeal of a prior, previously uncompelled extension of state law, it is the 14th Amendment that now compels the continued extension of that state law. That same 14th Amendment, however, would not require that extra step in those states that did not originally extend state law. The result would be that the 14th Amendment would mean one thing in some states and something else in others.

These undersirable results are the logical conclusion of the position taken by petitioners.

IV.

CONCLUSION

The people of the State of California, by enacting Proposition 1, amended their constitution to conform the guarantees of the state equal protection clause to those of the equal protection clause of the 14th Amendment. To assert that this action is itself somehow a violation of the 14th Amendment defies logic and ignores precedent. The decision of the court below should be affirmed.

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Respectfully submitted,

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